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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 1166

JOSEPH A. FABIANICH,
MARY E. FABIANICH,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Joseph A. Fabianich and Mary E. Fabianich, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 10, 1962.

CITATIONS TO THE OPINIONS BELOW

On May 10, 1962, the United States Court of Appeals for the District of Columbia Circuit issued its decision and opinion affirming petitioners' convictions by the United States District Court for the District of Columbia, on December 19, 1961, in Criminal Case No. 253-61. The Case numbers in the United States Court of Appeals

were 16,784 and 16,785 which were consolidated by the United States Court of Appeals for the District of Columbia Circuit (p. 16). Said petitioners were convicted for violations of Title 18, U. S. Code Section 2421 and Title 22, D. C. Code, Section 2707.

JURISDICTIONAL STATEMENT

Petitioners were charged by an indictment with violations of Title 18, U. S. Code, Section 2421, in that it was alleged they knowingly transported in interstate commerce, and within the District of Columbia, a female for immoral purposes. The Petitioner, Joseph A. Fabianich, was convicted in theree different counts of violating the Mann Act aforesaid. The Petitioner, Mary E. Fabianich, was convicted in four different counts of violating the Mann Act aforesaid. Petitioners were also charged by indictment with violation of Title 22, D. C. Code Section 2707, in that it was alleged they individually received money for arranging assignation or debauchery of the same female. The Petitioner, Joseph A. Fabianich, was convicted in two counts of violating said section of the District of Columbia Code, and the Petitioner Mary E. Fabianich, was convicted in one count of violating said section of the District of Columbia Code.

The United States Court of Appeals for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered May 10, 1962. The Jurisdiction of this Honorable Court is invoked under Title 28, U. S. Code Section 1254.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the petitioners were denied a fair trial in the United States District Court, in violation of petitioners' rights under the Constitution of the United

States of America, Amendments V and VI, through the actions of the Trial Court below, and of the Assistant United States Attorney prosecuting, in harrassing counsel for the appellants, limiting cross-examination, permitting government counsel to cross-examine and pose leading questions to government witnesses and to make a personal attack upon counsel for the petitioners in closing argument to the jury and in the trial court making insulting, unnecessary, and improper comments, and in admitting into evidence an extra-judicial statement used in a limited manner for cross-examination, and, thereafter out of the presence of the jurors, permitting the withdrawal by the government of said statement, and in refusing to permit petitioners' counsel from arguing to the jury the weight to be given to the testimony of the accomplices who testified for the government and in refusing to allow petitioners' counsel to refer to the official transcript of proceedings in closing arguments to the jury.

2. Whether the trial court Judge Jackson, retired from the Congressional Court of Customs and Patent Appeals, validly had jurisdiction to render judgment in the Constitutional, United States District Court for the District of Columbia.

STATUTES AND RULES INVOLVED

The pertinent statutes are Amendments V and VI of the Constitution of the United States of America (Appendix p. 19), Title 18, United States Code, Section 2421 (Appendix p. 19), Title 22, D. C. Code, Section 2707 (Appendix p. 20).

STATEMENT OF THE CASE

Petitioners were jointly charged in a ten-count indictment with violations of Title 18, U. S. Code, Section 2421, and with violation of Title 22, D. C. Code, Section

2707. The Petitioner, Joseph A. Fabianich was convicted in three different counts of violating the Mann Act aforesaid: Count 1 involving the female Mary A. Pearson and one Sam Benewitz; count 8 involving the female Mary V. L. Sharp and one Graham Little; count 4, wherein it was alleged that the petitioners acted jointly, involved the female Mary V. L. Sharp and one Charles Prather. The petitioner, Joseph A. Fabianich was also convicted on two counts of violating Title 22, D. C. Code, Section 2707; in the third count the female involved was Mary V. L. Sharp, and the male Charles R. Prather; in the seventh count, the female involved was Mary V. L. Sharp and the male Graham Little. The petitioner Mary E. Fabianich was convicted on four different counts of violating the Mann Act aforesaid; the second count involved the female Mary V. L. Sharp and one John Thomas Baltzell, also known as "Cadillac Tommy". The sixth count involved the female Mary V. L. Sharp and one Charles R. Prather. The ninth count involved the female Mary V. L. Sharp and one Dozier Willard, who was not called as a witness at the trial. The fourth count, wherein both petitioners were jointly charged, was heretofore mentioned. The petitioner, Mary E. Fabianich was also convicted of violating Title 22, D. C. Code, Section 2707, in the fifth count involving the female Mary V. L. Sharp and one Charles R. Prather. The petitioners pled not guilty to the indictment when arraigned.

The trial commenced November 20, 1961, and was concluded November 28, when the jury convicted the petitioners on all of the counts submitted. Thereafter, on December 19, 1961, judgment and sentence was pronounced, whereby petitioner, Joseph A. Fabianich was committed to the custody of the Attorney General for a period of one year to three years on count one; one year to three years on count three, to run consecutive to the sentence on count one; one year to three years on count

four, to run consecutive; one year to three years on count seven, to run concurrent with the sentence on count one; and one year to three years on count eight to run concurrent with the sentences imposed on counts one and seven.

The petitioner Mary E. Fabianich was committed to the custody of the Attorney General for a period of one year to three years on count two; one year to three years on count four, to run consecutive to the sentence imposed on count two; one year to three years on count five, to run consecutive to the sentence imposed on count 4; one year to three years on count six to run concurrent with the sentence imposed on count two; and one year to three years on count nine, to run concurrent with the sentences imposed on counts two and six; each petitioner receiving a total sentence of three years to nine years confinement. Notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed by each petitioner on December 19, 1961, and the cases were consolidated on appeal.

REASONS FOR ALLOWING THE WRIT

I. Petitioners assert to this Court that they have not received a fair trial in the United States District Court. The Court below demonstrated its prejudice against the the defendants and its personal bias to the jury. The United States Court of Appeals for the District of Columbia in *Whitaker* v. *McLean*, 118 F.2d 596, 73 App. D.C. 259, stated:

> ". . . That the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; i.e., shall appear to be impartial." Citing *Berger* v. *United States*, 255 U.S. 22, 41 S.Ct. 230; 65 L. Ed. 481 . . .
>
> "Often some degree of bias develops inevitably during a trial. Judges cannot be forbidden to feel sympathy

> or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him. It follows that the judgment must be reversed."

At the very outset of the trial the Court demonstrated its personal bias and prejudice, against the petitioners, to the jury. The Court limited cross-examination of the government's witnesses. In the first count of the indictment, wherein the petitioner Joseph A. Fabianich was charged with violating the Mann Act by causing transportation of the female complaining witness, Mary Ann Pearson, for the purposes of prostitution with the government witness Samual Benewitz, the petitioner's theory to be shown to the jury was that the petitioner merely gave the witness Benewitz the telephone number of the complaining witness, Mary Ann Pearson, so that the witness Benewitz could attempt to obtain female companionship. The Court (J.A. 8) prohibited the defense from attempting to bring out these relevant facts in cross-examination of the complaining witness Mary Ann Pearson. When the testimony of Samuel Benewitz following that theory was developed on cross-examination by defense counsel, the Court permitted the prosecuting attorney on re-direct examination to cross-examine the government witness (J.A. 13-16), and the Court became angry with defense counsel when that counsel arose to object to the impropriety of the proceedings, and defense counsel was greeted with improper and unnecessary comments from the bench and ordered to sit down without being permitted to state the ground for defense counsel's objections. During the testimony of the principal government witness, Mary V. L. Sharp, the Court further demonstrated to the jurors the Court's prejudice and bias against the petitioners by the Court's limiting the cross-

examination of this witness. The Court did not allow the defense to inquire as to the present address of the witness (J.A. 33) and would not allow the defense to attack the witness' credibility by inquiring as to her vocation in a house of prostitution during the months of January through May of 1960 (J.A. 36, 37). One of the counts of the indictment involved a date during that period of time and the theory of the defense being that, if the witness was employed at a house of prostitution during that period of time, she could not logically be working as a prostitute for the petitioners.

The defense was limited in attempting to show that this witness had been a prostitute in her home at Marlboro, Maryland, prior to her arrival in Washington, D. C. (J.A. 37). The defense was limited in attempting to show the moral character of this witness (J.A. 38-39). The defense was further limited in its cross-examination and attempts to attack the credibility of this witness (J.A. 38, 39). The Court limited the defense from impeaching this witness (J.A. 43, 44) and refused to even listen to a proffer of proof; the Court demonstrated to the jurors its irritation with counsel for the defense (J.A. 34, 35, 44), and made improper and unnecessary remarks badgering counsel (J.A. 44, 45). The Court further limited cross-examination of this witness (J.A. 45), and made further improper and unnecessary comments (J.A. 47, 48), and again refused to hear a proffer of proof from the defense, it being essential to the defense to know the correct name, or aliases, of the complaining witness, so that her criminal record might be obtained for purposes of impeachment. The Court favored the government by limiting cross-examination of this witness (J.A. 56-61). The Court showed its favoritism to the government by permitting the prosecutor to badger defense counsel (J.A. 49) and by the Court's shouting at defense counsel and threatening defense counsel with contempt of court. Apparently the Court's bias against the

petitioners carried over to counsel for the defense as the Court expressed its motive was to be harsh with counsel for the defense (J.A. 50). Possibly the most lucid demonstration of the Court's attitude as between government and defense appears in the Court's permitting the prosecutor to cross-examine on re-direct examination this same principal government witness, Mary V. L. Sharp (J.A. 68-72), and in receiving into evidence the extra-judicial statement of this witness (J.A. 67) and thereafter permitting same to be withdrawn from evidence without any comment to the jury (J.A. 124, 125). This Trial tactic employed by the prosecutor placed the onus upon the defense that the statement was particularly damaging to the defense since the defense objected to its admission in evidence, particularly since the witness, on several occasions, had testified that the contents of the extra-judicial statement were true, whereas her testimony, given in Court under oath, was incorrect (J.A. 42, 54, 55, 61, 64).

Throughout the testimony of the remaining government witnesses, who were all offered in an attempt to corroborate the testimony of Mary V. L. Sharp, the principal government witness, the Court conveyed to the jury the Court's personal preference for the government, bias and prejudice against the defense, by interfering with cross-examination by the defense (J.A. 74, 80, 81, 131), and by permitting the prosecutor to pose admittedly leading inquiries of government witnesses (J.A. 78) while holding the defense to the strict rules of evidence. *Blunt* v. *United States*, 244 F.2d 355, 100 U.S. App. D.C. 266, at page 276:

> "The constitutional guarantee of trial by jury limits the judge's role . . . . (he) cannot be argumentative in his comments; he cannot be an advocate, he cannot urge his own view of the guilt or innocence of the accused" (citing *Billeci* v. *United States*, 87 U.S. App. D.C. at p. 283) . . . .

> "By the questions and instructions we have quoted, and by showing special favor to the prosecution in other ways as well, the judge exceeded these limits."

See footnote 26, page 277. Also, at page 276 citing *Blumberg* v. *United States*, 222 F.2d 469, 501:

> ". . . It is far better for the trial judge to err on the side of abstention from intervention in the case rather than on the side of active participation in it, especially when the major part, if not all of his interruptions and interventions, though by chance rather than by design are, or seem to be, on, or tending to be on the side of the government."

All of the foregoing citations occurrsed while the government was presenting its case in chief. During the testimony of the defense witnesses the Court further demonstrated to the jury bias against the defense by permitting the prosecutor to make a personal attack upon defense counsel and ordering defense counsel to sit down (J.A. 96, 97) and then, when the counsel for the defense attempted to make argument to the Court in his own personal defense, he was again greeted by a Court order to be seated. Surely it would have been improper and disrespectful for defense counsel to address the Court from a seated position. Apparently, when defendants are tried before Judge Jackson, in a sex case, they are not entitled to the assistance of counsel; although this counsel knows of no constitutional exceptions to that effect. The Court again demonstrated to the jury the Court's favoritism of the government's position when it permitted the prosecutor to impeach a witness called by the defense by cross-examining that witness about her prior history of arrests (J.A. 105). Again, prohibiting defense counsel from stating the ground of his objection to the question, i.e., that a witness may only be impeached upon cross-examination with a record of criminal convictions, not arrests; counsel again was promptly requested by the Court to sit down.

Title 14, D. C. Code, Section 305 specifically limits cross-examinations of witnesses, or parties, to convictions of crimes, not arrests. The United States Court of Appeals for the District of Columbia as long ago as 1932, ruled in the case of *Clawans* v. *District of Columbia*, 62 F.2d 383, 61 App. D.C. 298, at page 299:

> "While the rule is that a defendant who voluntarily offers himself as a witness in his own behalf is, like any other witness, subject to have his evidence impeached by a showing that he had been convicted of a crime, the rule, so far as we can determine, has never been carried to the extent of permitting conviction for the violation of a municipal ordinance to be shown as affecting credibility—certainly unless the ordinance covered an offense malum in se.
>
> * * * *
>
> "But the basis of the admissibility of convictions always was and always should be grounded upon the theory that the depraved character of persons who commit crimes involving moral corruption makes them unworthy of trust in testifying. This theory, however, has little or no basis in the violation of municipal ordinances, or for that matter misdemeanors, involving no element of inherent wickedness. In Schnick v. United States, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann.Cas. 585, the Supreme Court said the word 'crime' as contained in the third article and the Sixth Amendment of the Constitution did not include an offense punishable only by a fine. We think the same is true in the sense in which it is used in the statute in question."

In the case at bar the prosecutor had the witness convicted in the eyes of the jury of sodomy, vagrancy, prostitution, and operating a disorderly house when, in fact, she had never been convicted of any crime. This, of course, inexorably destroyed this defense witness' testimony which was essential to the defense, since her entire testimony was a direct contradiction of the testimony given by the principal complaining witness, Mary V. L. Sharp. That rule of evidence governing impeachment

of a witness, is so clear that the Court's permitting a violation of the rule could only have been motivated by the Court's bias, and prejudice, against the petitioners. The jurors would of necessity be deaf, dumb, and blind, to fail to recognize the Court's partiality against the petitioners. See also *Campbell* v. *United States*, 176 F.2d 45, 85 U.S. App. D.C. 133, at page 135. This action of the trial court, without even permitting argument from defense counsel, clearly demonstrated the advocacy of the government's position by the Court.

Throughout the trial, the Court summarily decided motions and ruled against defense objections to evidence without hearing or permitting argument by the defense. The entire transcript is a citation to this point, but petitioners cite (J.A. 111, 125, 131, 138), as examples.

When the petitioner Joseph A. Fabianich attempted to testify in his own behalf, the Court, working in conjunction with the prosecuting attorney for the government, limited the direct examination and prohibited the petitioner from explaining his actions in regard to the charges against him (J.A. 107-116). The petitioner Joseph A. Fabianich's testimony on direct examination consumed nineteen pages of the transcript. On fourteen of those pages there appears an instance of interruption or interference by the Court and/or the prosecuting attorney for the government. On re-direct examination, the petitioner's testimony consumed two pages (J.A. 121). The Court again permitted the prosecuting attorney to interrupt the appellant's testimony on two more occasions. On cross-examination of the petitioner Joseph A. Fabianich, by the very able prosecutor, the Court rendered all assistance possible to the government's attorney and interjected unnecessary and improper comments (J.A. 122, 123). When defense counsel attempted to object to the manner and methods employed by the prosecutor in interrupting the petitioner's answers to

questions posed in the cross-examination, the Court made further unnecessary and improper remarks to counsel, informing defense counsel that he was interrupting the prosecutor's questions, *Salazar* v. *United States*, 293 F.2d 442.

When the government introduced rebuttal witnesses, the Court made unnecessary and improper comments to and about counsel for the defense (J.A. 126, 127, 129), showing irritation with defense counsel for attempting to make argument to the Court. The Court limited the cross-examination of the government rebuttal witnesses (J.A. 129, 130, 131), always refusing to listen to argument from defense counsel or to permit a proffer of proof to be made at the bench. When defense counsel properly attempted to impeach one of the government witnesses called in rebuttal by interrogating that witness of his prior record of criminal convictions, not arrests, (J.A. 132-134), the Court further demonstrated to the jury its partiality for the government and its bias and prejudice against the defense by permitting the prosecuting attorney to tear the criminal record of the witness from the hands of defense counsel, and then the Court proceeded to shout at defense counsel and order defense counsel to resume his seat and quit talking to the Court when defense counsel was attempting to make an objection to the Court; the final wound was made in the heart of the defense when the Court then proceeded to threaten counsel for the defense with punishment for contempt of court. The petitioners cite the decision of the United States Court of Appeals from the District of Columbia in the case of *Peckham* v. *United States*, 210 F.2d 693, 93 U.S. App. D.C. 137 at pp. 144, 145 and 146:

> "A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the

judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor. As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court, are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal.

* * * *

"But the imponderables involves in judging the effect of these defects, as distinct from specific rulings or actions which we have separately considered and find in no instance to constitute prejudicial error, call for an appraisal based upon the entire trial, including its result.

* * * *

"The majority believes, that in the light of the disorderly atmosphere of the trial, it would require too great a degree of speculation to say that the appellant was fairly tried on the issues relevant to the first count. We are all agreed that the misconduct of appellant's counsel which helped produce such atmosphere is for the contempt proceedings against counsel, and scrupulous care must be taken not to weigh such misconduct against appellant."

The Court's summary denial of petitioners' proposed instructions (J.A. 140-142), and the Court's prohibition of counsel's use of the official transcript of the testimony in closing argument for the defense (J.A. 142-143) and in refusing to allow defense counsel to argue to the jury on the weight to be given to the testimony of the accomplices are cited to this Court as additional examples of the Trial Court's actions demonstrating bias, and

prejudice against the petitioners. At the close of the government's opening summation to the jury, the Court called for closing argument on behalf of the defense, and then, without any provocation whatsoever, insulted the defense, and defense counsel, by admonishing the jurors not to go to sleep during defense counsel's final argument. Certainly, it cannot be argued that any of the jurors, no matter how tired they may have been, could have slept through the argument of Mr. Caputy, the prosecuting attorney, which immediately preceded the Court's statement of admonition (J.A. 142). This action by the Court, coupled with the Court's forbidding defense counsel to refer to the official transcript of the trial testimony in defense counsel's closing argument to the jury, so disconcerted defense counsel that defense counsel was caused to forget the most important point to be made to the jury, that being, to develop the theory that the principal complaining witness, Mary V. L. Sharp, was aided and assisted in her itinerary of prostitution by her own husband (J.A. 143, 144), and not the petitioners; thereby denying petitioners effective assistance of counsel. Thereafter, the prosecutor, in his final closing argument to the jury, conducted a personal attack upon counsel for the defense (J.A. 144-145). The sum total of the actions of the Court and the prosecutor throughout the trial denied to the petitioners the effective assistance of counsel and a fair trial as guaranteed in the Fifth and Sixth Amendments to the Constitution of the United States of America.

In the trial of this case, for some reason unknown to the petitioners, other than personal prejudice and bias, the Judge in the Court below refused to allow the petitioners a fair attempt to obtain an acquittal from the jury. The Court impressed his sentiments strongly upon the jury throughout the case. From the very outset, the Court was antagonistic to the defense, instead of acting impartially. The Court permitted the prosecuting

attorney to run rampant over the defense while limiting the defense and confining the defense to the strict rules of evidence. These actions, petitioners argue, this Court should not allow to stand; *Billeci* v. *United States*, 184 F.2d 394; 87 U.S.App.D.C. 274 at page 283:

> "The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused."

II. Petitioners argue to this Court that the Trial Court, Judge Jackson, a retired judge of a Congressional Court, The Court of Customs and Patent Appeals, did not validly have jurisdiction to render judgment in the United States District Court below, a Constitutional Court. Petitioners are cognizant of this Court's having under consideration the case of *United States* v. *Lurk*, 368 U.S. 815 wherein the same issue was raised relevant to the same Presiding Judge.

CONCLUSION

Petitioners urge this Court, upon consideration of the points raised in this petition, to reverse the judgment of the court below.

Respectfully submitted,

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APPENDIX

Filed May 10, 1962, Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,784

September Term, 1961.
Criminal 253-61

JOSEPH A. FABIANICH, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 16,785

September Term, 1961.
Criminal 253-61

MARY E. FABIANICH, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Washington and Bastian, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgments of the District Court appealed from in these cases is affirmed.

Per Curiam.

Dated: May 10 1962

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,784

JOSEPH A. FABIANICH, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

No. 16,785

MARY E. FABIANICH, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeals from the United States District Court
for the District of Columbia

Decided May 10, 1962

Mr. Stanley M. Dietz for appellants.

Mr. Daniel A. Rezneck, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Nathan J. Paulson* and *Victor W. Caputy*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Judah Best*, Assistant United States Attorney, also entered an appearance for appellee.

Before BAZELON, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: Appellant Joseph Fabianich was convicted by a jury on three different counts (Counts 1, 4 and 8) of violating the Mann Act, 18 U.S.C. § 2421

(1958), and two counts (Counts 3 and 7) under a provision of the District of Columbia Code, D. C. Code § 22-2707 (1961), dealing with the receipt of money for arranging for acts of prostitution. Appellant Mary Fabianich was convicted on four Mann Act counts (Counts 2, 4, 6 and 9) and one count (Count 5) of violating D. C. CODE § 22-2707. Sentences of one to three years were imposed on Joseph Fabianich, to run concurrently on Counts 1, 7 and 8; similar sentences were imposed on Count 3 (consecutive to Count 1), and on Count 4 (consecutive to Count 3). Mary Fabianich was similarly given concurrent sentences of one to three years on Counts 2, 6 and 9, and sentences of one to three years each on Count 4 (consecutive to Count 2) and Count 5 (consecutive to Count 4).

Appellants' primary argument here is that they were denied a fair trial because of certain actions of the court and the Assistant United States Attorney below. We have examined the record, however, and find that the conduct of the trial fell within permissible limits.

Appellants further claim that the court erred in denying Mary Fabianich's motion for acquittal on Counts 4, 6 and 9, and Joseph Fabianich's motion for acquittal on Counts 1, 7 and 8. The convictions on Counts 4, 6 and 7 are clearly valid. Under the doctrine of *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), taking into consideration the convictions on the remaining counts not challenged by the motions for acquittal, the sentences must be sustained.

We have considered appellants' other contentions and find no error.

Affirmed.

STATUTES INVOLVED

Constitution of the United States of America

ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 United States Code § 2421. Transportation generally.

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1548, ch. 645, § 1, 62 Stat. 812, amended May 24, 1949, ch. 139, § 47, 63 Stat. 96.)

22 D. C. Code § 2707—Procurer—Punishment for receiving money or valuable thing for arranging assignation or debauchery—Penalty.

Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of arranging for or causing any female to have sexual intercourse with any other person or to engage in prostitution, debauchery, or any other immoral act, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than five years and a fine of not more than $1,000. (June 25, 1910, 36 Stat. 833, ch. 404, § 3; Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 3.)

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 166

JOSEPH A. FABIANICH AND MARY E. FABIANICH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 17-18) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered May 10, 1962. The petition for a writ of certiorari was filed June 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a retired judge of the Court of Customs and Patent Appeals, whose authority to sit was not challenged until appeal, could validly preside at petitioners' trial.

2. Whether petitioners had a fair trial.

STATEMENT

Petitioners were convicted on various counts charging violations of the Mann Act (18 U.S.C. 2421) and of 22 D. C. Code 2707 prohibiting the receipt of money for arranging prostitution. Petitioner Joseph Fabianich, who was convicted on counts 1, 3, 4, 7 and 8, was given consecutive sentences of imprisonment for from one to three years on the first three of such counts (a total sentence of three to nine years), with the sentences on counts 7 and 8 running concurrently with that on count 1. Petitioner Mary Fabianich, who was convicted on counts 2, 4, 5, 6 and 9, received a similar total sentence of three to nine years, the sentences on the first three of such counts running consecutively, and the others concurrent with that on count 2. On appeal the convictions were affirmed.

The government's evidence on the counts on the basis of which the court of appeals affirmed the convictions consisted principally of the testimony of the prostitute involved, Mary Sharp. She testified that one or the other petitioner arranged "dates" for her and that she gave part of the money she received to one of the petitioners. The man involved in each case also testified

as to how he met Mrs. Sharp, his relations with her and the fact of payment.[1]

Petitioners contended in the court below and now contend in the petition for a writ of certiorari that rulings by Judge Jackson deprived them of a fair trial. As to this the court of appeals said (Pet. 18):

> We have examined the record, however, and find that the conduct of the trial fell within permissible limits.

ARGUMENT

1. Petitioners' attack upon the authority of Judge Jackson, a retired judge of the Court of Customs and Patent Appeals, to preside at the criminal trial in the District of Columbia (Pet. 15), is disposed of by this Court's decision in *Lurk* v. *United States*, No. 481, October Term, 1961, decided June 25, 1962.

2. As to petitioners' contention that the conduct of the presiding judge deprived them of a fair trial, we think that the record as a whole supports the conclusion of the court of appeals that petitioners were justly convicted after a fair trial. To reach that conclusion it is not necessary to agree with every ruling made by the trial judge. However, the record as a whole shows that petitioners have misinterpreted some remarks, exaggerated the importance of others and neglected to consider the extent to which defense counsel invited adverse rulings, especially by his attempt to

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[1] See as to Count 2 (J.A. 17-18; 27, 73-74); Counts 3 and 4 (J.A. 19-20, 27-28, 70, 75-76A); Counts 5 and 6 (J.A. 20, 70-71, 76A); Counts 7 and 8 (J.A. 21, 71, 77-80).

try the government's chief witnesses rather than the issues in the case.

a. A number of the rulings of which petitioners complain were in limitation of attempts to show the immorality of the government witness, Mary Sharp, who had already admitted to being a prostitute (see J.A. 25, 35, 37-38, 41, 51-52). The court did allow questions as to whether the witness used narcotics (J.A. 50) and later permitted her to answer questions as to her employment by another as a prostitute (J.A. 63). It also allowed the defense to put on testimony that the witness had arranged dates for another woman in 1954 and 1955, several years before the times charged in the indictment (J.A. 101-103). The court permitted full cross-examination of the witness as to the matters relating to her direct examination. Such limitations as there were on the cross-examination of the witness fall within the rule that the trial court has discretion to control the pursuit of collateral issues. *Wright* v. *United States*, 183 F. 2d 821, 822 (C.A. D.C.); *Blumenfield* v. *United States*, 284 F. 2d 46, 55-56 (C.A. 8), certiorari denied, 365 U.S. 812. Questions as to the present residence of the witness were properly not allowed in view of the government representation, supported by the testimony of an FBI agent out of the presence of the jury, that the witness had been threatened (J.A. 33-34). *United States* v. *Rich*, 262 F. 2d 415, 418-419 (C.A. 2).

Petitioners claim that they should have been allowed to inquire as to the activities of the witness in a house of prostitution during the months of January through May of 1960 (J.A. 36, 37) because count 10 of the in-

dictment charged a "date" by the witness on January 15, 1960, arranged by petitioner Mary Fabianich (Pet. 7). However, that count was dismissed at the close of the government's case on the ground that the witness had testified that she made that date on her own (J.A. 86-87). Petitioners also argue (Pet. 8) both that it was error to admit in evidence the statement of Mary Sharp to FBI agents, on the basis of which she had been cross-examined by the defense, and that it was error to withdraw it before it was seen by the jury (J.A. 124-125). Since petitioners' counsel objected to having the statement in evidence when it was first offered and reasserted later that he did not want the statement in evidence (J.A. 125), and since the statement is not in itself evidence,[2] petitioners are in no position to complain of the ultimate correct ruling. The fact that petitioners' counsel objected to the admissibility of the statement before the jury could not have had the prejudicial effect which petitioners claim (Pet. 8). The jury never saw the statement and heard only those parts which petitioners' counsel read to the witness (*e.g.*, J.A. 53-55).

The alleged interference with the cross-examination of the men who testified (Pet. 8) relates to only a few rulings, which, when examined, prove to be reasonable rulings of the trial judge in an attempt to clarify (J.A. 74, 90) or to keep the trial within reasonable limits (J.A. 81, 129, 131).

Similarly, the claim that the direct examination of

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[2] *See Affronti* v. *United States*, 145 F. 2d 3, 7 (C.A. 8); *United States* v. *Switzer*, 252 F. 2d 139 (C.A. 2), certiorari denied, 357 U.S. 922.

petitioner Joseph Fabianich was unduly curtailed (Pet. 11) is without merit. The limitations on direct examination were reasonable attempts to keep the testimony within the issues (J.A. 109, 115) or to clarify the issues (J.A. 110-111). The court allowed the direct examination to cover matters considerably afield from the charges of the indictment (*e.g.*, J.A. 109, 113).

b. The judge was occasionally critical of defense counsel, usually with considerable justification (J.A. 9, 45, 48, 49, 55, 57, 59, 123, 127), but there was only one exchange before the jury that could be fairly characterized as an altercation (R. 133).[3]

Nor do the procedures followed by the court in hearing and determining counsels' objections to evidence afford a basis for petitioners' claim of bias. Early in the trial, the judge stated that he would not hear argument after he had ruled, but would request argument after objection was made if he wished to hear it (J.A. 14; see J.A. 34). A number of times, the court admonished petitioners' counsel for disregarding this procedure (J.A. 105, 111, 130, 131) but did occasionally allow argument after a ruling (J.A. 67, 69) and permitted argument before ruling when it had doubts with respect to the issue raised (J.A. 103, 115).

Petitioners' exaggeration of incidents is illustrated by the statement that the prosecutor made a personal attack on counsel (Pet. 9). The record shows that the prosecutor meant the defendant (who was the witness at the time) when he said counsel and so explained as

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[3] There were two other arguments outside the presence of the jury (J.A. 49-50, 110-111).

soon as he realized the slip (J.A. 96-97). Similarly, argument of government counsel, based upon the record, that petitioners had not supported by evidence impeaching questions asked on cross-examination of the government's chief witness (J.A. 144-145), is characterized by petitioners (Pet. 14) as a personal attack on counsel. Petitioners also consider as an insult to the defense the remarks of the judge to the jury (J.A. 142):

> I might admonish the jurors not to go to sleep during the argument, because I don't see how you can possibly do your duty as jurors and keep your eyes shut. Keep your eyes open and your ears open too or you are not doing your proper function as a juror.

This remark was made after the prosecutor's argument and before that on behalf of petitioners (see Pet. 14). The reasonable interpretation is that the judge had observed some of the jurors closing their eyes and admonished them before the defense began its argument.

In his instructions, the judge charged the jury not to interpret his actions as an expression of opinion (J.A. 148).

c. Although they do not raise as a separate question the correctness of the court's rulings on various matters, petitioners argue that the fact that the judge ruled against them showed bias. This conclusion is unwarranted. Many of the cited rulings were correct, but, even if they were not, mere error does not establish prejudice.

For example, petitioners complain that the judge did

not instruct that the government witnesses were accomplices (J.A. 140-142; *cf.* Pet. 13). The judge did instruct that "no matter how small the degree may be, the person who aids another in the commission of a crime is an accomplice" (J.A. 153). This was clearly adequate.

Petitioners argue that prejudice was shown by the fact that the court allowed a defense witness to be cross-examined as to arrests for running a disorderly house and for sodomy.[4] The defense had called the witness for the purpose of "attacking the character" (J.A. 102) of Mary Sharp, the government's chief witness, who had already admitted to being an avowed prostitute (J.A. 103). The defense witness testified on direct that she had engaged in prostitution on dates made for her by Mary Sharp during 1954-1955 which was prior to the times charged in the indictment (J.A. 101-103, 113). On cross-examination the witness testified that she had abandoned prostitution after 1959 and it was in response to this testimony that the court permitted the prosecutor to ask the questions concerning her arrest on several occasions in 1960 on charges which indicated the falsity of her statement. The court stated that it considered the cross-examination proper (J.A. 106). While the correctness of the ruling may be open to dispute (but see *Beach* v. *United States*, 149 F. 2d 837, 839 (C.A. D.C.), certiorari denied, 326 U.S. 745), it was clearly not prejudicial considering

[4] Contrary to the implication in the petition (Pet. 12), the court did not impede defense counsel's attempt to impeach one of the government witnesses with questions concerning his prior record of criminal convictions (J.A. 132).

the tangential purpose for which the witness was called and in no sense indicates that the court was biased against petitioners.

There are other rulings by the judge about which some question could be raised, such as the prohibition against counsel's use of the transcript during oral argument (J.A. 142-143). However, petitioners do not claim that this was reversible error and it could not be such since counsel could summarize the facts from the transcript.

In sum, the fact that petitioners' arguments were frequently rejected does not necessarily evince hostility. The record as a whole shows that, as the court of appeals held, "the conduct of the trial fell within permissible limits" (Pet. 18).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.

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